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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 636

JOSEPH GERMANO, ET AL., *Appellants*,

v.

OTTO KERNER, ET AL., *Appellees*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO ADVANCE AND BRIEF IN OPPOSITION TO THE MOTION TO AFFIRM

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Illinois Constitutions:

	Page
Constitution of 1818	8
Constitution of 1848	8
Constitution of 1870, Currently Effective	8
Article IV, Section 6	5, 7

Illinois Statutes:

Illinois Rev. Stat., Ch. 46, §§ 158-2-158-5 (1962 Supp.)	5

Articles:

Anthony Lewis, N. Y. Times (Western Ed.), March 21, 1963, p. 6	15

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Appellants have heretofore and in accordance with Rule 15 filed a Jurisdictional Statement, reference to which is made hereby, and which is incorporated herein. Appellees have filed a Motion to Affirm, which Motion does not controvert any of the basic factual matter set forth in the Jurisdictional Statement.

Pursuant to Rule 43(4), Appellants move this Court to advance the hearing of this Appeal so that it may be considered along with, or soon after, *Lucas* v. *Forty-Fourth General Assembly of Colorado*, No. 508, in which this Court noted probable jurisdiction on December 9, 1963, and before a decision is rendered in the other legislative appor-

tionment cases already argued before the Court this Term.

Appellants' grounds to advance this cause are stated in this Brief in Opposition to the Motion to Affirm, which follows:

I. The Illinois Senate Apportionment Scheme Reflects a "Crazy-Quilt" Pattern

On pages three and four of their Motion to Affirm, Appellees make the following statement:

> "Appellants show *only* that Illinois senatorial districts, from each of which one state senator is elected, are not equal in population. On that fact alone, appellants base their contention that Illinois senatorial apportionment offends the Fourteenth Amendment. They ask this Court to hold that population is the exclusive permissible standard of apportionment of both houses of all state legislatures under all circumstances." (Emphasis supplied.)

Appellees' version of the facts and contentions of Appellants is misleading. True, Appellants firmly contend that only by holding that "one-man, one-vote" means "one-man, one full-vote" will this Court finally settle all the uncertainties which now enshroud legislative apportionment cases. As stated in the Jurisdictional Statement, if the Court sanctions any slight degree of vote dilution and debasement as not violative of the Fourteenth Amendment, Courts will be constantly inundated with apportionment cases presenting ever differing degrees of equality. (Jur. St., p. 11).

Appellants have appended to the Jurisdictional Statement (pp. 64-70) maps and charts which disclose gross and widespread inequalities in the populations of Illinois

Senate districts. While Appellants most emphatically urg the Court to rule that these population disparities in and themselves invalidate the Illinois senatorial apportionmen scheme, it is not true, as Appellees contend, that Appe lants have shown "only" inequalities of population. Thes same maps and charts, the accuracy and propriety of whic neither the Court below nor Appellees have challenged portray an irrational, "crazy-quilt" scheme of apportion ment. They disclose that thirty senators representing les than twenty-nine per cent of the State's population ca determine the destiny of a legislative proposal. Althoug this twenty-nine per cent minority of the populace con sists predominantly of rural citizens, this is not uniformly true. Six of the thirty least populous senate districts are situated in Chicago. Another is located in Cook County outside of Chicago. The remaining twenty-three of the thirty smallest districts are found in various parts of the State outside of Cook County, ranging from the 56th dis trict in the northwestern corner of Illinois to the 51st dis trict which is located in the far southeastern part of the State. (Jur. St., App. F, G, H and J, pp. 64-66, 69). Fur ther demonstrating this total lack of consistency is the fact that more than twenty-five per cent (nine of thirty-four) of the over-represented districts are Cook County districts. (Jur. St., App. J and K, pp. 69-70.)

Turning now to the under-represented citizens of Illinois, we find that the patern of under-representation is no less arbitrary and inconsistent than is that of over-representation. Twenty-four senate districts are under-represented. (Jur. St., App. J and K, pp. 69-70.) One would assume from reading the Appellees' Motion to Affirm that these would be the twenty-four districts allocated to Cook County, that this would be what the Appellees describe as "a check upon domination of the entire state by a single county."

(Mot. to Aff., p. 5.) But this is not so. Nine of these twenty-four districts in which there is less than ideal representation (Jur. St., p. 6) are located in various portions of Illinois outside of Cook County, including the far western part of the State (districts 53 and 47), the far northern sector (districts 52 and 54), the southern region (district 49), the easternmost areas (districts 41 and 52) and the center of the State (districts 45 and 18). (Jur. St., App. H, J and K, pp. 66, 69-70.) Only ten of the twenty-four under-represented districts are located in the City of Chicago. (Jur. St., App. J and K, pp. 69-70.) The remaining five districts evidencing vote dilution are in the suburbs of Cook County which are as philosophically and politically distinct from Chicago as are the most rural sectors of the State. (Jur. St., App. J and K, pp. 69-70.) We have then the following scheme of apportionment and discrimination in the Illinois Senate.

	Number of Districts	Number of Districts Over-represented	Number of Districts Under-represented
Chicago	18	8	10
Cook County—Outside of Chicago	6	1	5
Remainder of State	34	25	9
Totals	58	34	24

It is thus seen that there are three categories of discriminatees—(a) many Chicago citizens, (b) most Cook County suburbanites and (c) a substantial number of downstate residents. As stated in Appellants' Jurisdictional Statement, there are flagrant and egregious inequalities of district population and senatorial representation not only between the three general segments of the State—Chicago,

the Cook County suburbs and the areas outside of Chicago —but within each of these general segments. (Jur. St., pp. 6-7.)

As is evident from a mere perusal of the maps and charts attached to Appellants' Jurisdictional Statement, the Illinois Senate apportionment scheme abounds in voting power discrepancies and inconsistencies. Nor are the "crazy-quilt" tendencies limited to population figures, for the maps and charts disclose that the Illinois districts cannot be justified in terms of area figures, numbers of counties which have been combined in drawing district boundaries or on any other statistical basis. (Jur. St., App. F, G, H, I and J, pp. 64-69). Indeed, Appellees do not even attempt to justify the Illinois Senate districts on any of such grounds.

The Illinois Senate apportionment scheme is thus not unlike that described in *Baker* v. *Carr*, 369 U.S. 186, which Mr. Justice Clark described as a "crazy-quilt without rational basis." (369 U.S. at 254).

II. The Illinois Senate Apportionment Scheme Which Vests Perpetual Control in a Decided Minority of the State's Population Has Not Been Justified by Appellees Nor Can It Be Justified Under the Fourteenth Amendment.

In addition to ignoring or pretending that the "crazy-quilt" features of the Illinois apportionment scheme do not exist, Appellees have overlooked a much more fundamental and significant aspect of the system. Article IV, Section 6 of the Illinois Constitution and the implementing statutes enacted thereunder (Jur. St., App. C, pp. 43-60) specifically divide the State into three segments for purposes of apportionment. As noted above and in Appellants' Jurisdictional Statement (p. 5), these seg-

ments are Chicago, the Cook County suburbs and the remainder of the State. Except for one brief footnote reference at page 5 of their Motion to Affirm where Appellees state that "the constitution also recognizes a division within Cook County between the City of Chicago and its suburbs," this most obvious characteristic of the Illinois apportionment provisions is not only ignored but is subverted by the Appellees. Instead, they imply throughout their Motion to Affirm that Chicago and the Cook County suburbs are a single, monolithic whole, the residents of which have an identity of problems, interests, aspirations and social and political views. Based upon this faulty and spurious premise, Appellees then claim that the policy or "purpose" of the Senate scheme is to "balance" the "interests of the single, highly urbanized county" (Mot. to Aff., p. 1) or, stated otherwise, to place a "check upon the domination of the state by that single county" (Mot. to Aff., p. 3; see also pp. 5, 8, 10-11).

This is a belated attempt to ascribe to the constitutional and statutory provisions here in question a policy or a justification which was never intended, which could not have been intended for the reason that the purported evil sought to be overcome is non-existent, and which, even if intended, would be improper under the Fourteenth Amendment.

The Court below, although observing that the Illinois scheme "discriminates against certain voters, particularly against those such as themselves [the Appellants] who live in metropolitan as opposed to rural areas,"[1] could find no policy or rationale such as that offered by Appellees. Rather, as observed in the Jurisdictional Statement (p. 6), the Court below determined that Illinois senate apportionment rests upon "an arbitrary, clearly

[1] 220 F. Supp. at 232.

political compromise motivated, area basis," adding that the statistical materials submitted "correctly and unequivocally depict a clear picture of population disparities in state senatorial districts."[2]

In an effort to prove that what the Court below found to be an "arbitrary, clearly political compromise motivated" scheme of apportionment is in reality a rational means of controlling Cook County, Appellees rely upon *Donovan* v. *Holzman*, 8 Ill. 2d 87, 132 N.E.2d 501 (1956), and what is called an "official statutory explanation" of the 1954 constitutional amendment (Mot. to Aff., pp. 8-9). Neither of these references support the position of Appellees.

In the *Donovan* case the only question decided was whether the eighteen senatorial districts within the City of Chicago were (a) sufficiently contiguous and compact and (b) sufficiently uniform in area to satisfy the requirements of Article IV, Section 6 of the Illinois Constitution. *Donovan* did not even discuss the thirty-four "downstate" or six Cook County suburban senatorial districts. Regarding the eighteen Chicago districts, the Illinois Supreme Court held only that "on this record we cannot conclude that the legislature did not apply the principal [sic] of compactness nor give 'prime consideration' to area." (8 Ill. 2d at 97). To the extent that the *Donovan* case was concerned exclusively with the comparative "area" measurements of the eighteen Chicago Senate districts, it is evident that Appellees are grieviously in error when they cite *Donovan* for the proposition that the Illinois Supreme Court there "recognized" that the "policy" of Illinois senatorial apportionment is "to avoid putting the entire legislative power of the state in the hands of a single

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[2] 220 F. Supp. at 232.

county, and to insure the people of the whole state an effective voice in the legislative process." (Mot. to Aff., p. 8).

Appellee's reliance upon the "statutory explanation" is equally fallacious. This "explanation" states, *inter alia*, that the apportionment scheme is "based on a form of area representation" similar to that embodied in the United States Constitution. (Mot. to Aff., p. 9). Appellants need not at this time elaborate upon the inappropriateness of this "federal analogy," for the fallacy of this concept was discussed in the Jurisdictional Statement. (Jur. St., pp. 16-17). See *Gray* v. *Sanders*, 372 U.S. 368, 378. Apart from the "federal analogy" question, it should be noted that this "explanation" did not state that the constitutional amendment was intended to favor or discriminate against any group or groups of citizens, nor did it give any indication who would be the beneficiaries or discriminatees of the amendment. It did not inform the voters that the proposed scheme was a departure from the whole course of Illinois constitutional history which required equal representation in both houses of the legislature, as expressed in the Constitutions of 1818, 1848 and 1870, as well as in the Northwest Ordinance of 1787 and the Illinois Enabling Act of 1818. (Jur. St., pp. 7-8). Irrespective of its content the "explanation" was mere window dressing in light of the failure of the proposed constitutional amendment to afford the voters of Illinois an opportunity to select an effective system of representation based upon population as opposed to the proposed scheme which forced the citizenry to choose between perpetual minority rule in only one house or continued minority rule in both houses of the Illinois General Assembly. (See Jur. St., pp. 15-16). Finally, as Appellants have shown in the Jurisdictional Statement (pp. 15-16), even if the voters had been given

a fair choice in 1954, the rejection of a plan of apportionment based upon population would not be conclusive in determining whether the plan, as subsequently implemented, is presently violative of the Fourteenth Amendment.

Clearly, therefore, neither the *Donovan* case nor the "official statutory explanation" evidence any purpose or policy of placing a "check" upon the voters of Cook County. Appellees offer no other evidence that such a policy was intended. On the other hand, the Court below and the apportionment system itself indicate that the sole policy, if indeed it can be called such, was one of expediency. As has been noted, the constitutional and statutory apportionment provisions do not treat Chicago and the Cook County suburbs as a single entity, as a single voting bloc. Consistent with tradition and local and national experience, the Constitution distinguishes between Chicago with its 3.5 million residents and the Cook County suburban area with its 1.5 million citizens. Even assuming *arguendo* that either Chicago or the Cook County suburbs constitute homogenous, identifiable voting groups, the interests of one or the other of which are at times incompatible with those of the "downstate" area, it is evident on the basis of simple arithmetic that the 4.9 million downstate citizens need not fear domination by either group by reason of *per capita* representation. Admittedly, any such speculation is utter nonsense, for interest groups are not constant and unvarying. Issues determine interests and votes. No one can say today what issue will arise or how individual legislators will vote tomorrow. We set forth the foregoing arithmetic and categories simply to show that the apportionment provisions in question were not, and could not possibly have been, intended to "balance" Cook County

"interests" against "the interests of the remainder of the state" as the Appellees contend[3] (Mot. to Aff., p. 1).

Equally obvious is the fact that, even if the apportionment provisions had been designed to "check" or "control" some imaginary statewide dominance on the part of a monolithic Cook County electorate, the present scheme of apportionment fails to effectuate such a policy. As is shown in the preceding section of this brief, the Illinois Senate maps reflect an utter hodge podge of confusion. It was observed that of the twenty-four under-represented senate districts nine are located in "downstate" Illinois, outside of Cook County, while Chicagoans are victimized in but ten districts. Nearly one-half of the Chicago districts are over-represented. Only in the case of suburban Cook County has there been anything approaching consistency, five of six districts being disadvantaged while the sixth district is grossly over-represented to the extent that only three other senate districts have less population. The only conclusion one can reach is that *some* Chicago citizens, *some* suburban citizens and *some* downstate citizens are "protected" from the "dominance" of *other* Chicago citizens, *other* suburban citizens and *other* downstate citizens for reasons and by the operation of forces which neither have been expressed nor can be deduced.

The Illinois apportionment scheme having thus been shown neither to have been conceived in accordance with nor to effectuate any discernable policy, we are left with what was termed in *Baker* v. *Carr*, 369 U.S. at 226, as "a discrimination [which] reflects *no* policy, but simply arbi-

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[3] Interestingly enough, at pages 9 and 10 of their Motion to Affirm Appellees themselves question the urban-rural, downstate-Cook County distinction. In view of this, one is inclined to question why the Appellees are concerned with balancing the interests. The answer obviously is that the Illinois apportionment scheme is so poorly effectuated and so confusing that the Appellees themselves are not certain to what extent their interests are and are not protected.

trary and capricious action." Under the Fourteenth Amendment such a scheme must surely fail. But there is a much more fundamental defect inherent in Appellees' approach. The policy asserted by Appellees is clearly an afterthought, a contrivance born of desperation and designed to explain that which is inexplicable. Moreover, it is an attempt to justify, as euphemistically as possible, perpetual discrimination on a wholesale basis against urban citizens and in favor of rural citizens. Executed more skillfully in some cases and perhaps less adroitly in others, this type of retrospective rationalization has been and will be undertaken by every proponent of the *status quo* in every legislative reapportionment case until such time as it is made absolutely clear that the Fourteenth Amendment requires substantial equality of vote and representation in both houses of state legislatures. Nothing could more eloquently portray the need for a "one-man, one-full-vote" concept, which Appellees so derisively attack, than does the attempt of the Appellees to justify the Illinois discrimination.

Appellees argue that the Appellants and those similarly discriminated against are not harmed in that the Governor of Illinois, as well as other State officers, is elected pursuant to a statewide vote "in which a majority of the state taken as a whole controls." (Mot. to Aff., pp. 4-5). Appellees add that the majority of Illinois residents are doubly fortunate in that the lower House is constitutionally required to be reapportioned "according to population each decade, following the federal census." (Mot. to Aff., pp. 4-5).[4] Their position is apparently that the Governor and/or lower House can defend the majority against the minority by

[4] The Illinois Supreme Court on Saturday, January 3, 1964, sitting in emergency session, ruled that the membership of the Illinois House must be elected on an at-large basis in 1964. In addition, the Court denied motions to have the twenty-nine Senate seats up for election in 1964 filed on a state-wide basis.

vetoing and/or defeating legislative enactments which are contrary to the interests of the majority. Putting aside the complexities of mustering legislative majorities and the many facets of the administrative-legislative dichotomy, this is precisely the type of justification that one might anticipate from those who have been in control of the legislative processes of Illinois since 1901 or earlier. It is an attitude of inaction, of the *status quo*.[5] The beneficiaries of the present Illinois Senate apportionment scheme have long since enacted their legislative programs. As is alleged in the Complaint (Par. 18) and as was conceded by the Appellees in their Consent to District Court's Suggestion That Case Be Taken On The Complaint As filed, Appellants and those similarly situated bear a disproportionately large share of the tax burden of Illinois, while receiving a disproportionately small share of the appropriations and disbursements of State funds. In short, Appellees and those similarly situated no longer require absolute legislative control. They are content with the retention of legislative veto power exercised through their domination of the Illinois Senate. Having dominated the legislative councils for fifty or more years, the forces of the *status quo* may not be pleased at the prospect of relinquishing control of one house of a bicameral legislature, but they will happily settle for *perpetual* control of the remaining house and will concede the governorship to the majority forces in the bargain.

The fallacy of Appellees' arguments are obvious. Long before *Baker v. Carr* the Governor of Tennessee was elected by a majority of the voters, and in light of *Gray* v. *Sanders*, 372 U.S. 196, this is now a universal requirement. How-

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[5] Indeed, Appellees admit as much, stating at pages 11-12 of their Motion to Affirm that "our tradition is replete with examples of the *preference for inaction* until the advent of a degree of consensus greater than fifty-one to forty-nine." (Emphasis supplied.) Needless to say the instant case does not present a "fifty-one to forty-nine" situation but rather a perpetual twenty-nine to seventy-one disparity.

ever, the problems of modern-day state governments will not be solved by the creation of legislative impasses. The legislature must be an instrument of change and of development. If our purpose is stagnation, this could be accomplished simply and economically by dispensing with our legislatures (and establishing budgetary commissions to appropriate state funds.) Clearly, this is not our National or local aim. Ours is a government of the people, of people with tremendous problems and needs which only they can solve and satisfy. Accordingly, the people must be given the right to govern themselves in accordance with the will of the majority. If the Illinois system, which perpetually empowers less than twenty-nine per cent of the people to frustrate that will is permitted to stand, *Baker* v. *Carr* will become nothing more than an interesting but meaningless exercise in the law of jurisdiction and justiciability instead of the Magna Carta for the elector. By according to the majority the full vitality of their voting franchise in the Illinois Legislature, this Court will not have deprived the minority of a legislative forum in which to express its views. The minority can be adequately represented without the inevitability of vesting upon it veto power over the majority. A full vote should not be dependent upon where a man lives, the color of his skin, his religion or national origin. *Gomillion* v. *Lightfoot*, 364 U.S. 339.

III. Grounds Supporting Motion to Advance

This Appeal presents material and questions germane to the problem of state legislative apportionment which are not presented in the other cases currently before this Court. It is beyond question that the area of legislative apportionment is of vital importance to the Nation, and a tremendous responsibility rests with the Court in reaching a satisfactory adjudication of the issues there involved.

Therefore, the Court should have for its consideration all the information possible before making any ruling in this area.

Appellants seriously urge that the Court consider the factual peculiarities in the instant Appeal before undertaking to decide the crucial questions posed by the pending state legislative apportionment cases. For instance, the Court will note that the manner in which the Illinois voters approved the Senate apportionment scheme differs completely from the manner in which the voters of Colorado approved the constitutional amendment involved in *Lucas* v. *Forty-Fourth General Assembly of Colorado, supra.* In the *Lucas* case the proposed amendment approved by the voters came about through the popular initiative and referendum, a procedure which is not available to the voters of Illinois. Moreover, in *Lucas* the people were given a real choice of determining whether they wanted a system of representation in both houses based upon population or on the alternative basis which was approved by them. But notwithstanding these and other factual differences, Appellants vigorously contend and are prepared to argue that the "one-man, one-vote" principle is the only ultimate solution in all cases involving legislative apportionment.

Appellants are prepared to file their brief before the argument in *Lucas* and as the Court may so direct. Moreover, Appellants would, if required by the Court, waive any further reply; or, alternatively, would file a reply shortly after the argument. The appendices to Appellants' Jurisdictional Statement contain all of the opinions below, constitutional and statutory provisions, graphs and charts which uncontrovertedly reveal the current apportionment scheme as it relates to the Illinois Senate.

Conclusion

The gross discrepancies of representation which exist by virtue of the Illinois Senate apportionment scheme are uncontroverted in this case. Neither the Court below nor Appellees have presented any meaningful evidence to justify such discrepancies. Further, Appellants contend that the equal protection clause of the Fourteenth Amendment permits no justification for the unequal treatment of voters. A political commentator has appropriately expressed the crucial issue when, in commenting upon *Gray* v. *Sanders* and the "one-man, one-vote" principle on which the decision rested, he asked:

> "Why should it be permissible to use the device of unequal legislative districts, any more than the unit rule system, to give one man ten times the vote of another?"[6]

For the reasons set forth above, Appellants submit that probable jurisdiction of the Appeal should be noted, and that this Motion To Advance should be granted.

Respectfully submitted,

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[6] Anthony Lewis, N. Y. Times (Western Ed.), March 21, 1963, p. 6.